

## Message Text

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E.O. 11652: N/A

TAGS: CGEN

SUBJECT: UNITED STATES V. MARGOLIS, ET AL.

REF: KERT/BOYLAN TELCON 1/11/77; STATE 4969

1. DEPT BELIEVES DEFENDANT'S ARGUMENT TO NETHERLANDS COURT  
WILL BE BASED ON CONCEPT OF "JUDICIAL SOVEREIGNTY".  
ACCORDING TO THIS THEORY, ANY JUDICIAL ACT PERFORMED BY  
A FOREIGN GOVERNMENT (E.G. TAKING OF A DEPOSITION BEFORE  
A U.S. CONSUL) DEROGATES THE SOVEREIGNTY OF THE HOST GOVT  
IF DONE WITHOUT THE APPROVAL OF THE HOST GOVT. IN COUNTRIES  
WHICH FOLLOW THE THEORY (E.G. SWITZERLAND, VENEZUELA, USSR)  
THE ONLY APPROPRIATE WAY OF SECURING APPROVAL IS TO TURN  
PROCEDURE OVER TO HOST GOVT BY MEANS OF LETTER ROGATORY.  
GOVT HAVING JURISDICTION OVER THE PLACE WHERE THE WITNESS  
IS FOUND EXECUTES LETTER ROGATORY BY SUMMONING THE WITNESS  
BEFORE ONE OF ITS COURTS AND ASKING HIM THE QUESTIONS  
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SUBMITTED BY THE COURT WHICH ISSUED THE LETTER ROGATORY.  
THIS PROCEDURE IS FOLLOWED WHETHER WITNESS IS WILLING TO  
BE DEPOSED OR NOT.

2. MOST COUNTRIES RECOGNIZE THAT THE TECHNICAL INFRINGE-  
MENT OF SOVEREIGNTY IN ALLOWING DEPOSITIONS OF WILLING  
WITNESSES IS SO SLIGHT COMPARED TO THE BURDEN IMPOSED ON

THE ADMINISTRATION OF JUSTICE BY REQUIRING LETTERS ROGATORY THAT THEY PERMIT TAKING OF DEPOSITION WHERE NO COMPULSION IS USED TO SECURE WITNESS'S ATTENDANCE. PERMISSION CAN BE FORMAL (I.E. BY RATIFYING A BI-LATERAL OR MULTI-LATERAL JUDICIAL ASSISTANCE TREATY, OR ENACTING A JUDICIAL ASSISTANCE STATUTE) OR INFORMAL (I.E. BY LETTING DEPOSITIONS TAKE PLACE WITHOUT OBJECTION).

3. THERE IS NO MULTI-LATERAL JUDICIAL ASSISTANCE TREATY TO WHICH THE U.S. AND NETHERLAND ARE BOTH PARTY. (ALTHOUGH THE NETHERLANDS RATIFIED THE 1905 HAGUE CIVIL PROCEDURE CONVENTION, THE U.S. DID NOT, AND THE NETHERLANDS DID NOT RATIFY THE HAGUE EVIDENCE CONVENTION, TO WHICH THE U.S. IS A PARTY). THERE IS NO BI-LATERAL TREATY FOR JUDICIAL ASSISTANCE BETWEEN THE U.S. AND THE NETHERLANDS EXCEPT FOR THE 1887 EXTRADITION TREATY WHICH DOES NOT COVER THE POINT. MOREOVER, DEPT IS UNAWARE OF ANY DUTCH STATUTE ANALOGOUS TO 28 U.S.C. 1782, WHICH PROVIDES FOR ASSISTANCE BY U.S. TO FOREIGN TRIBUNALS. CONSEQUENTLY, IT APPEARS THAT DUTCH ACQUISITION TO TAKING OF DEPOSITIONS IS INFORMAL.

4. DEFENSE WILL UNDOUBTEDLY URGE THAT THIS INFORMAL PRACTICE SHOULD NOT BE CONTINUED IN THE ABSENCE OF DOMESTIC LAW SPECIFICALLY PROVIDING FOR IT (ON THE GROUND THAT THE WAIVER OF SOVEREIGNTY WHICH IS THEORETICALLY INVOLVED MUST BE ACCOMPLISHED BY SOME FORMAL ACTION ON THE PART OF THE SOVEREIGN) OR ALTERNATIVELY, THAT THE UNCLASSIFIED

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PRACTICE NEVER EXTENDED TO TAKING DEPOSITIONS IN CRIMINAL CASES.

5. DEPARTMENT CONSIDERS THAT U.S. POSITION SHOULD BE TO URGE DUTCH COURT TO ASSIST IN TAKING OF DEPOSITION ON BASIS OF COMITY AND INTERNATIONAL COURTESY IN THE INTEREST OF THE ADMINISTRATION OF JUSTICE IN THE U.S. BEST WAY FOR COURT TO ASSIST. SINCE ITS PROCESS IS NOT REQUIRED TO COMPEL WITNESS'S ATTENDANCE, IS BY DISMISSING SHOW CAUSE ORDER OBTAINED BY DEFENDANTS. U.S. SHOULD STRESS ABILITY OF U.S. COURT TO RENDER APPROPRIATE ASSISTANCE TO A COURT OF THE NETHERLANDS IN A CONVERSE SITUATION. AUTHORITY OF U.S. COURT TO DO SO IS FOUND IN 28 U.S.C. 1782.

6. DEPARTMENT STRONGLY ADVISES AGAINST ASSERTING TO THE DUTCH COURT THAT IT HAS NO JURISDICTION OVER THE MATTER BY REASON OF PRIOR ORDERS ENTERED BY U.S. DISTRICT COURT, OR ARGUING THAT ACTION BY DUTCH COURT WOULD BE

INAPPROPRIATE IN LIGHT OF U.S. CITIZENSHIP OF PARTIES.  
STRONGEST ARGUMENT IS THAT BASED ON NECESSITY OF  
JUDICIAL COOPERATION BETWEEN COURTS OF DIFFERENT COUNTRIES  
IN AN ERA WHEN CRIME IS INCREASINGLY TRANSNATIONAL;  
NINETEENTH CENTURY NOTIONS OF SOVEREIGNTY ARE THE ANTITHESIS  
OF SUCH COOPERATION.

7. NOTE THAT ARTICLE 5(J) OF VIENNA CONSULAR CONVENTION  
AUTHORIZES CONSULS TO EXECUTE COMMISSIONS TO TAKE TESTI-  
MONY IN ANY MANNER COMPATIBLE WITH THE LAWS AND REGULA-  
TIONS OF THE RECEIVING STATE. ALTHOUGH NETHERLANDS  
IS NOT A PARTY TO THE VCC, IT COULD BE ARGUED THAT  
THIS PROVISION INDICATES THE RIGHT OF CONSULS UNDER  
ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW TO TAKE  
TESTIMONY ABSENT AN EXPRESS PROVISION TO THE CONTRARY  
IN THE LAWS OF THE RECEIVING STATE. (SWITZERLAND, USSR  
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AND MOST OTHER COUNTRIES MENTIONED IN PARA 1 ALL HAVE  
SUCH STATUTES).

8. IN LIGHT OF USG'S INTEREST IN CASE, CONSUL IS AUTHORI-  
ZED TO BE PRESENT AT HEARING ON RESTRAINING ORDER.

9. DEPT OF JUSTICE, FOREIGN LITIGATION UNIT, HAS NO  
OBJECTION TO HIRING LOCAL COUNSEL.  
ROBINSON

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